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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL ENMUND, :

Petitioner, : No. 81-5321

vs. :

STATE OF FLORIDA, :

Respondent. :

MOTION TO STRIKE PORTIONS OF PETITIONER'S REPLY BRIEF

Comes now Respondent, State of Florida, represented by the undersigned counsel and requests this Court to strike portions of Petitioner's Reply Brief.

This case is scheduled for oral argument on March 23, 1982. Petitioner has filed a Reply Brief in which he purports to "set the record straight." (Reply Brief for Petitioner, page 17). However, Petitioner has included direct quotations from several pretrial statements which, although available to the trial court, were not made part of the record on appeal and were not considered by the Supreme Court of Florida and are not part of the record currently before this Court.

Under Florida law, depositions and other statements which have not been filed in the lower tribunal are not made part of the record on appeal unless such inclusion is specifically requested. See Fla.R.App.P. 9.200(a)(1). No such request was made by Petitioner, and under Florida law it is his burden and responsibility to perfect the record on appeal.

Petitioner has used the information which was not available to the Florida Supreme Court to demonstrate his alleged lack of involvement in the crimes for which he was

convicted. Thus, this information is potentially relevant to the issue before the Court, and Respondent has been unable to refute Petitioner's contentions because of time constraints and the unavailability of an opportunity to file a subsequent brief. Petitioner should not be permitted to attempt to demonstrate how the Florida Supreme Court erred by citing to this Court information which Petitioner did not make available to the Supreme Court of Florida.

Specifically, Respondent requests that the portions of footnotes 15 and 16 which make reference to statements not found in the record before this Court be struck. Counsel for Respondent, before filing this Motion, attempted to resolve the problem with Petitioner's counsel. Petitioner's counsel declined to take any action on the matter. The Court should be informed that the objectionable material was selectively taken from statements which Respondent could use to support his argument had those statements been part of the record on appeal which was considered by the Supreme Court of Florida.

WHEREFORE, Respondent respectfully requests that portions of Petitioner's Reply Brief which cite to matters which were unavailable to the Supreme Court of Florida be struck.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike Portions of Petitioner's Reply Brief has been forwarded to William C. McLain, Assistant Public Defender, Hall of Justice Annes, 495 N. Carpenter Street, Bartow Florida 33830, this 18th day of March, 1982.

George R. Georgieff

GEORGE R. GEORGIEFF
Assistant Deputy Attorney General

COUNSEL FOR RESPONDENT